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Plaintiff's Brief in Opposition to State's Motion to Exclude Specific Items of Physical Evidence

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FILED

1999 DEC 21 1:26 PM THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO


ALAN DAVIS, Special Administrator)
of the Estate of)
SAMUEL H. SHEPPARD)
Plaintiff)
vs.)
STATE OF OHIO)
Defendant)

Judge Ronald Suster
Case No. 312322

**PLAINTIFF'S BRIEF IN
OPPOSITION TO STATE'S
MOTION TO EXCLUDE SPECIFIC
ITEMS OF PHYSICAL EVIDENCE**

Plaintiff hereby moves this Court to deny the motion *in limine* of the Defendant, State of Ohio, to preclude the Plaintiff from mentioning or using specific items of physical evidence. The reasons and authorities for denying the Defendant's motion are set forth in the attached brief in support, which is hereby incorporated by reference.

Respectfully submitted,



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BRIEF IN SUPPORT

I. BACKGROUND

Plaintiff intends to introduce two items of physical evidence and the results of tests conducted on those objects, and the State has objected to the introduction of these items.

The first of the two items is a bloodstained wood chip taken from the basement stairs of the Sheppard home. This piece of evidence was gathered by Mary Cowan of the Cuyahoga County Coroner's Office, and was introduced at the 1954 murder trial as State's Exhibit 84. This chip of wood was also included in the trace evidence report compiled by the Cuyahoga County Coroner's Office for the 1954 trial of Doctor Sheppard. When discovered, this exhibit was still marked and preserved in its original glass tube, as it had been introduced in the 1954 trial. There are photographs showing the condition and labeling of the item in the glass tube at its discovery. The Coroner's office resumed custody of this evidence following its recent discovery.

The second piece of evidence is a bloodstain taken from the door of Marilyn Sheppard's wardrobe. This piece of evidence was obtained by Dr. Paul Kirk and his associate Dr. Haas, whose collection of the evidence of was witnessed by Reverend Robert Scully. On behalf of the Plaintiff, a laboratory in Berkeley, California tested this evidence. In September of 1987, the material was sent to the coroner's office for their inspection. At trial, Plaintiff intends to present a prima facie case on the chain of evidence with regards to this bloodstain.

II. LAW AND ARGUMENT

The Ohio Rules of Evidence require that authentication or identification of evidence take place prior to the introduction of the evidence. Evid. R. 902. Authentication can take place by a number of methods, including direct evidence, expert testimony, or circumstantial evidence. In the case of the first piece of disputed evidence, the wood chip from the basement stairs, the State's argument should be regarded as one of chain of custody over the evidence. Because the wood chip was introduced in the 1954 trial against Dr. Sheppard, the real issue is the integrity of the evidence since it was gathered in 1954.

Ohio's courts have routinely recognized that questions regarding the chain of custody of evidence are matters that go to the weight of evidence, not to the admissibility of the evidence. In *State v. Earle*, 120 Ohio App.3d 457 (1997), the Eleventh District Court of Appeals reviewed the procedures where the integrity of sealed evidence was questioned. In *Earle*, the Appellant attempted to exclude evidence that was bagged and sealed by police officers and transported to the Lake County Crime Lab. The Appellant's argument was based on the fact that the Appellee could not establish an unbroken chain of custody. The Court of Appeals, in holding that the Appellee had established a sufficient chain of custody, recognized that "[t]he state need only establish that it is reasonably certain that substitution, alteration or tampering did not occur; breaks in the chain of custody go to the weight, not the admissibility, of [the] evidence." *Id.* at 471, 698 N.E.2d at 449 (citations omitted).

Courts have also upheld the admission of evidence where the chain of custody was questionable. In *State v. Mays*, 108 Ohio App.3d 598, 671 N.E.2d 553 (8th Dist. 1996), the Court reviewed the handling of medical records related to a criminal charge of tampering with records. In *Mays*, the Appellant's medical records had been transferred when his dental practice had been sold; the Appellant also demonstrated that the purchaser had motive to tamper with the records, since the buyer was suing the Appellant. *Id.* at 61, 671 N.E.2d at 566. In reiterating Ohio's long standing rule that the chain of custody could be shown through direct testimony or inference, the Court of Appeals held that there was ample evidence for the jury to determine the reliability of the evidence's chain of custody. *Id.*; *See also State v. Keene*, 81 Ohio St.3d 646, 662, 693 N.E.2d 246, 260 (1998)(in prosecution for numerous offenses, including multiple aggravated murders, the state is not required to prove a perfect, unbroken chain of custody).

In the present case, the State was the original possessor of the disputed evidence. The wood chip in question was obtained from the basement stairs of the Sheppard home by Mary Cowan, then an employee of the Cuyahoga County Coroner's Office. The evidence was introduced in the original trial against Doctor Sheppard as State's Exhibit 84. When the evidence was rediscovered, it was still in the condition it was in during the 1954 trial. There are photographs demonstrating the condition and labeling of the glass tube; if

necessary to establish the reliability of the evidence to the jury, these photographs may be introduced at trial to demonstrate the evidence's reliability. Because the State introduced this evidence at the 1954 trial and there is proof that the evidence was in its original condition when rediscovered, there is ample support for the proposition that the wood chip is the same wood chip introduced as Exhibit 84 in the 1954 trial against Doctor Sheppard. Because the evidence falls within the scope of Rule 901, the jury should be able to make a determination as to the reliability and credibility of the disputed wood chip.

Furthermore, the State's own failure to maintain evidence in a criminal case caused the alleged gap in the wood chip's chain of custody. The murder of Marilyn Sheppard remains an unsolved murder. Even if the State believed that the murder of Marilyn Sheppard was a closed case following Dr. Sheppard's conviction in 1954, the evidence should have been stored and maintained throughout the appeals process in the event of a retrial of Dr. Sheppard or the trial of another defendant for the murder of Marilyn Sheppard. For whatever reason, the State failed to maintain its own evidence in an unsolved murder. This evidence remained in the condition it was in for the 1954 trial of Dr. Sheppard, making it possible for the jury to determine what weight to give to the wood chip; even if it had not, and even if there is a gap in the evidence's chain of custody, the gap is due to the failure of the State to maintain custody of evidence. As such, the Defendant should be estopped from using its own failure to bar evidence from being introduced against it here.

The second piece of disputed evidence is the bloodstain taken from Marilyn Sheppard's wardrobe door. At trial, the Plaintiff plans to introduce evidence as to the collection and testing of this bloodstain. At trial, the State, which has had access to this material since 1997, will have the opportunity to cross examine the Plaintiff's expert witnesses on the subject, Dr. Barton Epstein and Dr. Mohammed Tahir. These witnesses will be able to testify as to the evidence's authenticity, the reliability of the evidence, and the results of their tests.

In the past, reviewing courts have held that the decision whether or not to hold a separate hearing is at the sole discretion of the judge. In interpreting the federal version of Rule 104, the Tenth Circuit Court

of Appeals recently held that there was no abuse of discretion where the trial court declined to hold a preliminary evidentiary hearing in the case of convicted Oklahoma City bomber Terry Nichols. *United States v. Nichols*, 169 F.3d 1255, 1263 (1999). In the case, Judge Matsch declined to hold an evidentiary hearing because the challenged evidence did not involve any new scientific theory and because the testing mechanisms were routine. *Id.* (citations omitted). As such, the court found that it is within the judge's discretion whether to hold an evidentiary hearing.

In the case at bar, the issue regarding authenticity of the closet stain is about the collection and testing of the material. The testing and collection mechanisms used by the Plaintiff's experts are neither new nor novel. *Id.* Furthermore, they are the same tactics used by the State in their collection and analysis of evidence. As such, the bloodstain's reliability should be decided by the jury at trial. At trial, both parties will have an opportunity to challenge the opposing party's evidence and its reliability, as well as the testing mechanisms employed by the Plaintiff's experts. As such, granting the State's motion would be duplicative, requiring Plaintiff to present evidence twice for the purposes of the same trial.

For these reasons, the Defendant's motion in limine to require prohibit the mentioning of these items should be denied, and no pre-trial evidentiary hearing pursuant to Ohio R.Evid. 104(A) should be held.

Respectfully Submitted,



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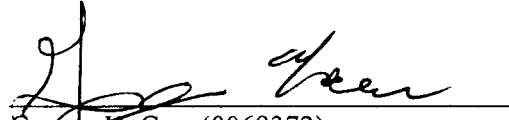
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Brief in Opposition to the State's Motion to Exclude Specific Items of Physical Evidence has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 21st day of December, 1999.


George H. Carr (0069372)
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